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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1933.

No. 142

NOAH STEWART, *Appellant,*

vs.

ROBERT KEYES, *ET AL., Appellees.*

BRIEF OPPOSING MOTION TO DISMISS APPEAL AND SHOWING GROUNDS FOR WRIT OF *CERTIORARI* IF MOTION GRANTED.

Summary of Brief.

Appellant inherited a one-half interest in the allotment of Lizzie Toney. He is a full-blood restricted Creek Indian. On July 1st, 1916, at which time he was of full age, a purported guardian sold his interest in said land. The guardianship was void and the sale was void.

By Act of April 12th, 1926, to be effective April 12th, 1928, Congress made the Oklahoma statutes of limitations applicable to actions brought by restricted Indians of the Five Civilized Tribes but gave all such Indians the right up to April 12th, 1928, to sue

"free from any bar of the statutes of limitations."

Until long after the passage of the act the uniform holding of the Oklahoma Supreme Court had been that the statutes of limitations of Oklahoma operated to transfer title to land, that the title to lands inherited by full-blood Indians of the Five Civilized Tribes could be alienated only as provided by Acts of Congress and that therefore, actions by such full-blood Indians to recover inherited land could not be barred by the statutes of limitations.

On April 11th, 1928, appellant brought suit to recover his interest in said land. The Oklahoma Supreme Court rendered judgment against him because, as it held, his action was barred by the statute of limitations.

The opinion of that court is quoted and quotations are made from the authorities cited in the opinion to show that the opinion by express words and in substance and effect and by necessary implication held the Act of Congress unconstitutional and void.

Argument is made that jurisdiction on the appeal should be sustained because the decision held against the validity of a statute of the United States. It is contended that the decision by express words and in substance and effect and by necessary implication held against the validity of such statute. Authorities are cited to show that it is not necessary that the decision against the validity be in express words but that jurisdiction to review exists if the decision in substance and effect or by necessary implication denies the validity of the statute.

Argument is further made that jurisdiction on the appeal should be sustained because the Oklahoma Supreme Court applied the state statute of limitations as against

the contention of appellant, made in that court, that the state statutes could not be applied because in conflict with the statutes of the United States. It is conceded that this legal contention was not made in the statement as to jurisdiction. But the general facts showing that this ground of jurisdiction existed are stated in the statement as to jurisdiction. This court has jurisdiction on appeal if the ruling of the state court was such as to give it jurisdiction and the purpose of the statement as to jurisdiction is to show what that ruling was. Since this court has held that the assignment of errors which is required both by statute and rule of court is not jurisdictional it would seem to follow that the statement as to jurisdiction which is required only by rule of court is not jurisdictional and that the failure to comply in all particulars with Rule 12 in setting up this ground of jurisdiction will not defeat the jurisdiction of the court.

In case this court should sustain the motion to dismiss the appeal, a writ of *certiorari* should be granted, for the state court has decided a federal question of substance in a way not in accord with the applicable decisions of this court and has decided against the long recognized paramount right of Congress to legislate concerning the inherited property of full-blood Indians. There are many pending cases which will be effected by the decision in this case. The highest court of the United States should maintain the supremacy of the laws of the United States made to protect full-blood Indians who are wards of the United States. The decision of the state court is in the highest degree unjust to dependent Indians in that the state court, while the statute of limitations was running, if applicable, held on grounds of federal law that the statute of limita-

tions was not applicable to actions by full-blood Indians to recover their inherited lands and then after statute, if applicable, had fully run changed its decision to hold the statute applicable to such actions.

Statement of the Case.

This is an appeal from a judgment of the Supreme Court of Oklahoma which became final on March 27th, 1934. The appeal was allowed on June 11th, 1934.

The opinion of that court is reported in 30 P. (2d) 75, and in LXIX Oklahoma Appellate Court Reporter 249. It will later be reported in the Oklahoma reports.

Appellees have filed a motion to dismiss for want of jurisdiction to review by appeal. They do not contend that a federal question is not presented by the appeal.

The facts shown by the jurisdictional statements of appellant and appellees are that, 160 acres of land were allotted to Lizzie Toney, a restricted full-blood Creek Indian, and patents were issued to her heirs. The appellant was one of her heirs and took a half interest in the allotment. He was an enrolled, full-blood restricted Creek Indian. On July 1st, 1916, one John A. Jacobs, acting as purported guardian of appellant, who was then of full age, purported to sell his half interest in the land. On April 11th, 1928, appellant brought suit to recover his interest in the allotment contending the guardian's deed was wholly void. The trial court rendered judgment against him and he appealed. The Supreme Court of the State of Oklahoma held that his action was barred by the statute of limitations and for that reason affirmed the judgment.

Appellant relied upon section 2 of chapter 115 of the Act of Congress of April 12th, 1926, 44 Stat. 239.

The material part of said Act of Congress is as follows:

> "The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians * * *; *Provided*, that no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this act, even though the full statutory period of limitations shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations."

Like statutes have been held constitutional except where they apply to statutes of limitations which have the effect of vesting title to real property in the occupant thereof.

Until after the passage of said Act the uniform holding of the Oklahoma Supreme Court had been that the statutes of limitations of Oklahoma operated to transfer title to land, that the title to lands inherited by full-blood Indians of the Five Civilized Tribes could be alienated only as provided by Acts of Congress and that therefore, actions by such full-blood Indians to recover inherited land could not be barred by the statutes of limitations. *Lytle* v. *Fulotka*, 106 Okl. 86, and other cases cited under III.

The Oklahoma Supreme Court by fair inference held that in this case the title to the property had been vested in

the occupants and the Act of Congress was therefore unconstitutional and void.

The opinion of that court said:

> "The plaintiff's original petition was filed on April 11th, 1928. The cause of action attempted to be stated therein was based on the allegations that the appointment of John A. Jacobs as guardian for him was invalid; that the continuation of such guardianship after the plaintiff had reached the age of majority was invalid and that the sale of the land in question by the guardian was invalid. Thereafter various amendments were filed.
>
> "Since the controlling issue is whether or not that guardian's deed can be attacked herein, the details of the allegations of the petition and amendments are not stated."

The opinion states that the guardian's deed was filed for record on the 12th day of July, 1916, and that the guardian was discharged on August 4th, 1917, and discusses sections 1444 and 99, Oklahoma Statutes, 1931, limiting the time for bringing suit to three years after the termination of the guardianship and to five years after the recording of the guardian's deed. The opinion then holds that the action is barred by the Oklahoma statutes of limitations and denies the contention of appellant that these statutes could not apply because repugnant to section 2 of chapter 115 of the Act of Congress of April 12, 1926, 44 Stat. 239, and denies the contention of appellant that he was given by that act the right to bring, up to April 12th, 1928, his action free from any bar of the statutes of limitations. The opinion by reasonable implication holds said Act of Congress invalid.

The holding of the court in full showing the reasoning on which its conclusion was based is as follows:

"The action was not commenced until the 11th day of April, 1928. The plaintiff contends that this action was brought under the provisions of section 2, chapter 115 of the Act of Congress of April 12, 1926 (44 Stat. 239), generally known as the Hastings-Harreld Act; that it was brought within the two-year period provided by that act, and that the restrictions provided in section 1444, O. S. 1931, as to attacks on guardians' sales do not apply. With that contention we cannot agree.

"In *Campbell* v. *Holt*, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. 209, the Supreme Court of the United States said:

> 'It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law.'

"The Hastings-Harreld Act, *supra*, did not and could not affect causes of action that had been barred by the statutes of limitation prior to the enactment thereof. See 17 R. C. L., sec. 16, p. 674; 34 Corpus Juris, sec. 14, p. 697.

"The right of the plaintiff to have the guardian's deed in question cancelled was barred by the applicable statutes of limitation prior to the commencement of this action, even though, as contended by the plaintiff, that deed was void."

The opinion also cites the case of *Stolfa* v. *Gaines,* 140 Okl. 292, 283 Pac. 563, which holds that under the Oklahoma law occupancy under a void guardian's deed for the period which bar an action to recover the land vests title to the land in the occupant, such title being "denominated a title by prescription."

Page 674 of 17 Ruling Case Law, section 16, on limitations, cited to sustain the holding of the opinion, reads as follows:

> "There appears to be no divergence of opinion as to the full applicability of the principle that the legislature cannot divest a vested right to a defense under the statute of limitations, whether the case involves the title to real estate or personal property...Where a right of action to recover property is barred in favor of one having possession thereof the possessor becomes the owner of the property, with all the incidents of ownership, and his title cannot be impaired by subsequent legislation."

The text cites as sustaining the last portion thereof the following cases:

> *Campbell* v. *Holt,* 115 U. S. 620, 29 L. ed. 483;
> *Moore* v. *State,* 43 N. J. Law, 203, 39 Am. Rep. 558;
> *McEldowney* v. *Wyatt,* 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609.

The first cited case is quoted from in the opinion. The second cited case holds that an act removing the bar of the statute of limitations which had already run in a criminal case was "unconstitutional and void." The third cited case, *McEldowney* v. *Wyatt,* holds:

> "Where title to property has vested under the statute of limitations no act can, by extending the stat-

ute or reviving the remedy, impair such title. It would be unconstitutional because depriving one of property without due process of law."

Taking into consideration the cases cited as authorities to sustain its holding, the opinion in this case, by fair inference holds that the statutes of limitations of the State of Oklahoma had prior to April 12th, 1926, vested the title to the allotment in controvery in the occupants thereof who had acquired a title by prescription and for that reason the Act of Congress, which gave the appellant the right to sue to recover the land

"free from any bar of the statutes of limitations"

was "unconstitutional and void" because having the effect of depriving the occupants of the land of their title by prescription, without due process of law.

The opinion in substance and effect denies the validity of an Act of Congress. This court has jurisdiction on appeal because the decision of the Oklahoma Supreme Court was against the validity of a statute of the United States.

The ruling of the Oklahoma Supreme Court complained of presents a further ground of jurisdiction for review by this court on appeal in that the state court applied a state statute to bar appellant's action and denied his contention that the statute so applied was repugnant to the laws of the United States.

Appellant's assignment of errors are as follows:

1. The Supreme Court of the State of Oklahoma erred in that it held that plaintiff's action, which was brought on April 11th, 1928, was barred by the statute of limitations

and in so holding it erroneously held against the validity of the provision of section two, chapter 115 of the Act of Congress approved April 12th, 1926 (44 Stat. 239), which gave Noah Stewart, the plaintiff in error, the right as a restricted Indian to have until April 12th, 1928, in which to bring his action free from any bar of the statute of limitations.

2. The Supreme Court of the State of Oklahoma erred in not rendering judgment for the plaintiff in error as prayed for by him.

Appellant's statement of points contains the following:

The appellant, pursuant to Rule 13, paragraph 9, states that upon the appeal he intends to rely upon the following points to obtain a reversal of the final judgment of the Supreme Court of the State of Oklahoma:

1. Appellant is a restricted Indian and is the heir of a restricted Indian and his action was brought to recover his restricted land.

2. Prior to April 12th, 1928, there was no statute of limitations in force in Oklahoma which applied to appellant's right of action, for the statutes of limitations of the State of Oklahoma did not apply to actions brought by restricted Indians to recover restricted land. Alienation of the title of a restricted Creek Indian to his restricted land can be had only as authorized by some Act of Congress.

3. Appellant was given until April 12th, 1928, in which to bring his action by section 2 of chapter 115 of the Act of Congress of April 12th, 1926, and the said act was valid.

4. Appellant's action was not barred by the statute of limitations.

ARGUMENT.

I.

Jurisdiction on appeal should be sustained because the judgment of the Supreme Court of Oklahoma in holding that appellant's action was barred by the Oklahoma statutes of limitations held against the validity of a statute of the United States, which gave appellant the right to bring the action "free from any bar of the statutes of limitations." While appellant contends that the Supreme Court of Oklahoma denied the validity of the statute by express words, it is sufficient to confer jurisdiction to review that in substance and effect or by necessary implication it denied the validity of the statute.

—*New York, ex rel. Bryant,* v. *Zimmerman,* 278 U. S. 63 at 67, 73 L. ed. 184 at 187;

St. Louis I. M. & S. R. Co. v. *Starbird,* 243 U. S. 592, at 601, 61 L. ed. 917 at 924;

Lawrence v. *State Tax Commission,* 286 U. S. 276, 76 L. ed. 1102;.

Ward v. *Love County,* 253 U. S. 17 at 22-23, 64 L. ed. 751 at 758;

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux,* 279 U. S. 737, 73 L. ed. 931;

Bunch v. *Cole,* 263 U. S. 250 at 252, 68 L. ed. 290 at 292.

Taking into consideration the language of the opinion, which is quoted in the statement of the case, and the authorities cited in the opinion to sustain its holding that appellant's action was barred by the statutes of limitations, it

is clear that the holding is based upon the following propositions:

1. Where the statute of limitations has fully run and its effect is to vest title to land in the occupant thereof, a statute which attempts to remove the bar of the statute of limitations is unconstitutional and void as taking property without due process of law.

2. The effect of the Oklahoma statutes of limitation is to vest a title by prescription in the occupant of land who has occupied adversely for the statutory period.

3. Defendants in this case have occupied adversely for the statutory period.

4. The Act of Congress which purports to give appellant the right to sue from any bar of the statutes of limitations is, therefore, unconstitutional and void.

After citing authorities to the effect that in certain cases statutes removing the bar of the statute of limitations are unconsitutional and void it says:

> "The Hastings-Harreld Act, *supra,* did not and *could not* affect causes of action that had been barred by the statutes of limitations prior to the enactment thereof. See 17, R. C. L., Sec. 16, p. 674; 34 Corpus Juris, Sec. 14, p. 697.
>
> "The right of the plaintiff to have the guardian's deed in question cancelled was barred by the applicable statutes of limitations prior to the commencement of this action, even though, as contended by the plaintiff, that deed was void."

Is it not clear that the necessary meaning of the words when taken in connection with the authorities cited is that the Act of Congress is invalid?

Appellees contend in effect that the opinion does not say in express words that the act is invalid. This court in *New York, ex rel. Bryant,* v. *Zimmerman,* 278 U. S. 63 at 67, 73 L. ed. 184 at 187, said:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

In *St. Louis I. M. & S. R. Co.* v. *Starbird,* 243 U, S. 592 at 601, 61 L. ed. 917 at 924, it is said:

> "It has never been required that a federal right must be denied in terms, but it has been uniformly held that it is sufficient if the state court necessarily denied it in the judgment rendered."

The following cases sustain the general proposition that in order to give this court jurisdiction to review the judgment of a state court it need not appear by express statement in the opinion of the state court that its holding is such as to give this court a right of review but that it is sufficient if a right based on a federal ground was denied in substance and effect and that it is the substance and

effect of the holding rather than the language used which determines whether there is a right to review by this court:

Lawrence v. *State Tax Commission*, 286 U. S. 276, 76 L. ed. 1102;

Ward v. *Love County*, 253 U. S. 17 at 22-23, 64 L. ed. 751 at 758;

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U. S. 737, 73 L. ed. 931.

As stated in *Ward* v. *Love County*, *supra*, the purpose of review by this court of decisions of state court is

"to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."

Therefore this court should hold that the provision allowing a review by appeal where the validity of an Act of Congress is involved is at least as broad in its scope as the provision allowing a review by appeal where the validity of a state statute is involved. In the latter case a review by appeal can be had if the state court gives force and effect to the state statute when a claim is made that as applied it is in conflict with a statute of the United States. *Bunch* v. *Cole*, 263 U. S. 250 at 252, 68 L. ed. 290 at 292. For to give force and effect to the state statute is in effect to hold the state statute valid.

Conversly to refuse to give force and effect to the statute is to hold it invalid, especially when the refusal to give effect to the statute is accompanied by argument, which could be directed only to show that the statute is unconstitutional and void. Certainly such an opinion does not concede the validity of the statute.

II.

Jurisdiction on appeal should be sustained because the Oklahoma Supreme Court applied the state statute of limitations as against the contention of appellant, made in that court, that the state statute could not be applied because in conflict with the laws of the United States. While it is conceded that jurisdiction on this ground was not specifically claimed in the statement as to jurisdiction, the general facts showing that this ground of jurisdiction exists are set forth in the statement as to jurisdiction. This court has jurisdiction on appeal if the ruling of the state court was such as to give it jurisdiction and the purpose of the statement as to jurisdiction is to show what that ruling was. Since this court has held that the assignment of errors which is required both by statute and rule of court is not jurisdictional it would seem to follow that the statement as to jurisdiction which is required only by rule of court is not jurisdictional and that the failure to comply with all the requirements of Rule 12 in asserting this ground of jurisdiction will not defeat the jurisdiction of the court on this ground.

—*Bunch* v. *Cole*, 263 U. S. 250, 68 L. ed. 290;

New York, ex rel. Bryant, v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184;

Independent School District of Ackley v. *Hall*, 106 U. S. (16 Otto) 428, 27 L. ed. 237;

Old Nick Williams Co. v. *United States*, 251 U. S. 541, at 544, 54 L. ed. 318, at 320;

Lamb v. *Cramer*, 285 U. S. 217, at 221-2, 76 L. ed. 715, at 720;

World's Columbian Exposition Co. v. *Republic of France*, 91 Fed. 64, at 69;

Green v. *United States*, 19 F. (2d) 850;

In re T. E. Hill Co., 148 Fed. 832.

The opinion of the Oklahoma Supreme Court says:

> "The plaintiff contends that this action was brought under the provisions of section 2, chapter 115 of the Act of Congress of April 12th, 1926 (44 Stat. 239), generally known as the Hastings-Harreld Act; that it was brought within the two-year period provided by that act, and that the restrictions provided in section 1444, O. S. 1931, as to attacks on guardian's sales do not apply. With that contention we do not agree."

The opinion then cites authorities which are obviously cited to show that the said Act of Congress is unconstitutional and void.

The record made shows that the Oklahoma Supreme Court applied the Oklahoma statute and denied the contention of appellant that the Oklahoma statute could not be applied because repugnant to the Act of Congress, which Act of Congress was by fair inference held unconstitional and void.

The record made presents a ground for review on appeal on the authority of:

> *Bunch* v. *Cole*, 263 U. S. 250, 68 L. ed. 290;
> *New York, ex rel. Bryant*, v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184.

However, since those cases were decided, the statutes relating to review of judgments of state courts have been changed to provide for appeal instead of writ of error and this court has amended its rules to provide for the filing of a statement disclosing the basis upon which it is contended that this court has jurisdiction upon appeal to review the judgment in question.

In this case the general error assigned is:

> "The Supreme Court of the State of Oklahoma erred in that it held that plaintiff's action, which was brought on April 11th, 1928, was barred by the statute of limitations * * *."

This assigns as error the ruling above quoted.

So we have a ruling which presents ground for review by appeal and a general assignment of error directed to the ruling but no specific claim, other than what may be inferred, that there was error in holding a state statute valid which was repugnant to the laws of the United States.

The statement as to jurisdiction specifically contends this court has jurisdiction because a statute of the United States was held invalid. It further states in effect that the Oklahoma Supreme Court had applied the Oklahoma statute of limitations contrary to a prior decision that the Oklahoma statute of limitations could not be applied under similar facts because repugnant to the laws of the United States. The statutes of limitations of the State of Oklahoma involved are summarized in the opinion of the Oklahoma Supreme Court. The statement as to jurisdiction does not make the specific claim that jurisdiction on appeal is based upon the fact, which is actually shown by the record, that the judgment complained of applied a state statute, which appellant contended could not be applied because repugnant to the laws of the United States. It can fairly be argued that the jurisdictional statement by fair inference shows that the nature of case and of the ruling of the court was such as to bring the case within the jurisdictional provision of the statute allowing review by appeal where a state statute is held valid against the contention that it is

repugnant to the laws of the United States. But it cannot fairly be contended that such ground of jurisdiction was relied on in the statement as to jurisdiction.

Appellant contends that whether this court has jurisdiction depends upon whether the rulings of the state court are such as to give this court jurisdiction under the statute and not upon whether the appellant in the statement as to jurisdiction specifically relies upon a particular ground of jurisdiction.

While the statute (section 862, U. S. Code) requires an assignment of errors, it has always been held that the assignment of errors

> "although required by the Act of Congress and the rule of court"

is not jurisdictional and an appeal will not be dismissed for lack of an assignment of errors.

—*Independent School District of Ackley* v. *Hall*, 16 Otto 428, 27 L. ed. 237;

Old Nick Williams Co. v. *United States*, 251 U. S. 541 at 544, 54 L. ed. 318 at 320;

Lamb v. *Cramer*, 285 U. S. 217, at 221-2, 76 L. ed. 715, at 720;

World's Columbian Exposition Co. v. *Republic of France*, 91 Fed. 64 at 69;

Green v. *United States*, 19 F. (2d) 850.

Likewise compliance with statutory requirements as to citation and bond have been held not to be jurisdictional.

—*In re T. E. Hill Co.*, 148 Fed. 832.

It would seem that if failure to file an assignment of errors required both by statute and rule of court would not defeat the jurisdiction, failure to allege in the statement

as to jurisdiction, which is required only by rule of court, that jurisdiction on the appeal exists on the ground here claimed would not defeat jurisdiction on that ground.

The purpose of the statement as to jurisdiction is to bring to the attention of this court the erroneous ruling of the state court which this court is asked to review by appeal.

In this case one ruling is complained of which is that the Supreme Court of Oklahoma adjudged that appellant's action was barred by the statutes of limitations of the State of Oklahoma. Such ruling should not have been made because the statute of the United States gave appellant the right to maintain his action free from any bar of the statutes of limitations, and the statutes of Oklahoma, which were applied to bar his action, were repugnant to the statutes of the United States. This ruling gave two interrelated grounds for this court, on appeal, to review the judgment. A specific claim of right to review on one ground is made in the statement as to jurisdiction. The general facts showing a right to review on the other related ground, that is that the state statutes applied to bar the action, are repugnant to the statutes of the United States, are mentioned in the statement as to jurisdiction although the right to review is not specifically based on this ground. The record discloses a right to review on both grounds.

Jurisdiction should be sustained on the second ground as well as first ground.

III.

In case this court should sustain the motion to dismiss the appeal then *certiorari* should be granted for in refusing to give effect to the plain language of an Act of Congress which gave appellant, who is a full-blood restricted Creek Indian, until April 12th, 1928, in which to sue "free from any bar of the statute of limitations," and in denying the authority of Congress to avoid the bar of a state statute of limitations against suits by restricted Indian wards of the United States, and in holding that his title to his inherited land had been alienated, prior to April 12th, 1926, by the statute of limitations, the state court held contrary to the applicable decisions of this court which hold that in all matters relating to full-blood Indian wards of the United States the Acts of Congress are supreme and which hold that the inherited lands of full-blood Indians can be alienated only by means provided by some Act of Congress. There are many pending cases in which the question here decided is involved. Titles will be effected by the decision. Full-blood Indians have always been regarded as wards of the United States. Therefore, when the state court refuses to give effect to an Act of Congress as the supreme law of the land, the highest court of the United States should protect the rights of the wards of the United States and maintain the supremacy of the laws of the United States made to protect full-blood Indians. Especially should review be had in this case as the state court held during the time the statute of limitations was running, if applicable, that such statute was not applicable to actions by full-blood Indians to recover their inherited lands because the application of such statute would be contrary to federal laws and then after the statute had fully run, if applicable, held that the stat-

ute was applicable and such change in decision as to the effect of federal laws is in the highest degree unjust to the dependent Indian wards of the United States, so that this court should determine which of the conflicting decisions of the Oklahoma court correctly decided the effect of the federal law.

The opinion of the Oklahoma Supreme Court has been analyzed in the preceding parts of this brief. It refuses to give effect to the plain terms of the statute of the United States which gave the appellant until April 12th, 1928, in which to sue

"free from any bar of the statutes of limitations."

Such refusal was on the ground that prior to the date of the passage of the act the appellees had acquired title to the property in controversy by the Oklahoma statute of limitations. But for such holding there could be no valid objection to the act for in all cases, except where title to property has passed by reason of a statute of limitations, the legislature may give further time in which to sue even though the time limited by the previous statute has fully run.

—*Campbell* v. *Holt*, 115 U. S. 620, 29 L. ed. 483;
Arcadia Mills v. *Carolina, C. & O. Ry.*, 293 Fed. 639, at 645;
Standley v. *United States Railroad Administration*, 271 Fed. 794;
United States v. *Chicago & E. I. Ry. Co.*, 298 Fed. 779.

If, as will be shown, the Oklahoma statute of limitations prior to April 12th, 1928, never applied to appellant's action, then the holding of the Oklahoma court that his ac-

tion was barred by the Oklahoma statute of limitation is erroneous, and its conclusion that the Act of Congress of April 12th, 1926, giving appellant until April 12th, 1928, in which to sue, could not be valid, as applied to appellant's action, is erroneous.

The Oklahoma court correctly held that the effect of the Oklahoma statute of limitations relating to the recovery of real property, where applicable, is to transfer the title to the property to the adverse occupant. *Stolfa* v. *Gaines*, 140 Okl. 292; *Toltec Rauch Co. v. Cook*, 191 U. S. 532, 48 L. ed. 291. In the last cited case this court said:

> "Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance."

In holding that the title to the inherited lands of the appellee, who is an adult full-blood Indian, could be alienated by the statutes of limitations prior to April 12th, 1928, the Oklahoma Supreme Court held contrary to all applicable decisions of this court and to many decisions of the Oklahoma Supreme Court.

It has been the uniform holding by this court that the alienation of lands formerly belonging to the Five Civilized Tribes in Oklahoma are not, unless Congress otherwise provides, subject to alienation by any state law of Oklahoma. Since appellees in their statement in support of their motion to dismiss have suggested that the rule is otherwise as to inherited lands and have stated that the lands in controversy are not restricted, the cases cited will be those which hold that the inherited land of a full-blood Indian are restricted.

After referring to the fact that the right to legislate concerning Indians was reserved to Congress by the Oklahoma Enabling Act, this court in *Sperry Oil & Gas Co.* v. *Chisholm*, 264 U. S. 488, at 493, 68 L. ed. 803, at 808, said:

> "Congress was thus careful to preserve to the United States the authority over the Indians, their lands and property, which it possessed prior to the passage of the Enabling Act; retaining full power, which it had exercised from the earliest period, to deal with them as dependent people, and legislate concerning their property with a view to their protection; with the right to determine when, in their interest, the government guardianship should cease, and plenary authority, notwithstanding the bestowal of federal citizenship upon them, to place restrictions upon their right of alienating the lands allotted to them. *Marchie Tiger* v. *Western Invest. Co.*, 221 U. S. 286, 309 • • •."

The term allotted lands is here used as inclusive of allotted lands which have been inherited by members of the Five Civilized Tribes. For *Marchie Tiger* v. *Western Investment Co., supra,* which is cited as authority, was a case concerning restrictions on conveyances by full-blood Indian heirs of allotted lands inherited by them and held such inherited lands to be restricted.

Parker v. *Richard*, 250 U. S. 235, 63 L. ed. 954, finally settled the question whether allotted lands after being inherited by full-blood members of the Five Civilized Tribes are still restricted by holding as follows:

> "1. *Lands inherited from a Creek allottee by a full-blood Indian heir were not freed from the restrictions on alienation* imposed by the Act of May 27, 1908 (35 Stat. at L. 312, Chap. 199), by the provision of #9 of that act, that the death of any allottee shall oper-

ate to remove all restrictions upon the alienation of the allottee's land, 'provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee,' since, as to this class of heirs, restrictions are not removed, but are merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval."

Other cases holding inherited lands to be restricted lands are:

Brader v. *James*, 246 U. S. 88, 62 L. ed. 591;
Talley v. *Burgess*, 246 U. S. 104, 62 L. ed. 600;
Kiker v. *United States*, 63 F. (2d) 957;
Conner v. *Cornell*, 32 F. (2d) 581, *certiorari* denied 280 U. S. 583.

This court in *Bunch* v. *Cole*, 263 U. S. 250, at 252, 68 L. ed. 290, at 292, said:

"The power of Congress to impose restrictions on the rights of Indian wards of the United States to alienate or lease lands allotted to them in the division of the lands of their tribe is beyond question; and, of course, it is not competent for a state to enact or give effect to a local statute which disregards these restrictions or thwarts their purpose. *Marchie Tiger* v. *Western Invest. Co.*, 221 U. S. 286, 316; * * * *Brader* v. *James*, 246 U. S. 88, 96; * * * *Mullen* v. *Pickens*, 250 U. S. 590, 595. * * *"

While this case concerns an original allotment, the three cases above cited to sustain the opinion concern deeds made by heirs. It is obvious that to permit inaction by a full-blood Indian to alienate his title would thwart the purpose of an act which allowed alienation only upon approval of a federal agency.

Attention at this time is called to some of the cases decided by the Oklahoma Supreme Court which held that prior to the passage of the act in controversy, the statute of limitations of Oklahoma could not be applied to bar an action by a full-blood Indian heir to recover his inherited land for the reason title to his inherited land could not be alienated except as provided by Act of Congress.

In *Lytle* v. *Fulotka*, 106 Okl. 86, 233 Pac. 456, the opinion states:

> "Plaintiffs were the heirs at law of one Toby Kelley, a full blood Creek Indian, who was the sole heir of Sukie Kelley, to whom the land in controversy was allotted as her proportionate part of the lands of the Creek Nation. She died before receiving her allotment, and patents were issued in the name of her heirs, August 6th, 1904."

The opinion showed that the guardian of Toby Kelley, who had been adjudged incompetent, made a void deed to this land. His heirs sued for its recovery. The defendants pleaded the statute of limitations. The court said:

> "*3.* The plaintiffs in erorr have pleaded the statute of limitations. So far as Toby Kelley is concerned, it is plain that his interest in the land in question could be divested only in the manner authorized by federal statute, to-wit, by a sale through the probate court. Having failed to obtain title in this manner, the purchasers could not obtain title by invoking the statute of limitations. The five years' statute of limitations against recovery of lands sold at judicial sale, saving to minors three years after removal of disability, does not apply to actions commenced by restricted Indians for the recovery of their restricted lands. Mills' Oklahoma Indian Land Laws, Sec. 338, citing *Patterson*,

et al., v. *Carter*, 83 Okl. 70, 200 Pac. 855, and other cases."

Other Oklahoma cases holding that lands inherited by full-blood Indians, who are members of the Five Civilized Tribes, are restricted and that, therefore, the statute of limitations of Oklahoma could not bar their recovery are:

Baldridge v. *Caulk*, 110 Okl. 185, at 189;
Tobey v. *DeKinder*, 110 Okl. 63, at 65;
Patterson v. *Carter*, 83 Okl. 70, at 73;
McLish v. *White*, 97 Okl. 150;
Curry v. *Browning*, 123 Okl. 106;
Anthis v. *Drew*, 123 Okl. 18.

Other Oklahoma cases holding such inherited lands restricted and, therefore, not subject to the applications of various Oklahoma statutes are:

Coleman v. *Battiest*, 65 Okl. 71;
Lewis v. *Gillard*, 70 Okl. 231;
Hoodenpyl v. *Champion*, 71 Okl. 270;
Eysenbach v. *Naharkey*, 114 Okl. 217;
Canfield v. *Jack*, 78 Okl. 127;
Murrow Indian Orphan's Home v. *McClendon*, 64 Okl. 205;
Molone v. *Wamsley*, 80 Okl. 181, cited approvingly in
Sperry Oil and Gas Co. v. *Chisholm, supra.*

The opinion in *Baldridge* v. *Caulk, supra*, said:

"We are further of the opinion that the interest of the heirs who are restricted from alienating their interest by the laws of the United States could be conveyed only in the manner provided by the laws of the

United States, and that such heirs could not be divested of their title by a state statute of limitations."

The opinion in *Tobey* v. *Dekinder, supra,* said:

"As we view the case, the question is not whether the creation of a new disability by Congress would arrest the running of the statute of limitations under ordinary circumstances, but whether the government, through Congress, in the exercise of its continuing guardianship over the plaintiffs, having taken the field and legislated concerning the sale and disposition of inherited lands owned by them, did not thereby exclude every other mode of acquiring title to such lands, including title thereof acquired by adverse possession under local statutes of limitations, where such title depended in part for its validity upon adverse possession held after the Act of Congress became effective."

The opinion in *Patterson* v. *Carter, supra,* as a ground for holding the statute of limitations was not applicable to the action, said:

"In the first place, it is well settled that an Indian who is under the guardianship of the United States cannot be divested of his restricted lands, whether acquired by allotment or *inheritance,* in any manner except that provided for by some Act of Congress."

These decision are all based on construction of federal laws. Since the state court has changed its decision as to what the effect of the federal law was, to the detriment of an Indian ward of the United States, a review should be had to determine which of the conflicting decisions of the state court as to the effect of the federal laws are correct.

It now takes nearly four years for the Oklahoma Supreme Court to decide an appealed case unless the same be given a preference. There have been long delays in many

cases pending in the District Courts. Many cases have been reversed for new trials. The result is there are many cases still pending brought prior to April 12th, 1928, in which the determination of the question whether limitations had run as to Indian lands prior to April 12th, 1928, will be decisive of the case.

Review should be had because the decision of the state court refuses to give effect to a valid Act of Congress, because the decision is contrary to the applicable decisions of this court, because the decision as to a matter of federal law is contrary to prior decisions of that court and its change of decision is in the highest degree unjust to the full-blood Indian wards of the United States and because the decision complained of will, if not reversed, be decisive of other pending cases.

Respectfully submitted,

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Service of the within brief is acknowledged this 10th day of July, 1934.

Counsel for Appellees.